No. .....

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

FRANK DURANT JEFFERS,

Petitioner,

versus

WILLIAM D. LEEKE AND
T. TRAVIS MEDLOCK,
Attorney General of South Carolina

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES B. RICHARDSON, JR.
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Attorney for Petitioner.

QUESTIONS PRESENTED

I.

Where the District court found a reasonable probability that the outcome of petitioner's criminal trial was affected by ineffective assistance of counsel, and where the District Court's factual finding of prejudice to petitioner was not clearly erroneous under Rule 52(a), F.R.Civ.P., did the Court of Appeals have authority to disregard the District Court's factual finding and to substitute its own?

II.

Where petitioner's trial counsel failed to object to repeated evidence and closing argument regarding petitioner's postarrest silence and request for an attorney, was there a reasonable probability that the outcome of the trial was affected?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 835 F.2d 522. The order of the District Court for the District of South Carolina is unreported. The opinion of the Court of Appeals is attached as Appendix A. The order of the District Court is attached as Appendix B.

JURISDICTION

The opinion of the Court of Appeals was rendered on December 15, 1987. Petition for rehearing was denied on January 20, 1988. The decision of the Court of Appeals is subject to review by virtue of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right *** to have the assistance of counsel for his defense."

STATEMENT

The District Court granted the writ of habeas corpus, finding that petitioner lacked effective assistance of counsel in his State criminal trial, and finding that there was a reasonable probability

that the outcome of the trial was affected by counsel's unprofessional errors.

The Court of Appeals did not disagree with the finding of ineffective counsel. On the question of prejudice, however, the Court of Appeals declined to confine itself to the "clearly erroneous" standard of review of Rule 52 of the Federal Rules of Civil Procedure. The Court of Appeals reviewed the record de novo and decided that there was no reasonable probability that the outcome of the trial was affected by the lack of effective assistance of counsel.

The Court of appeals reversed, and this petition followed.

ARGUMENT

I.

The Court of Appeals had no authority to override the District Court's finding that there was a reasonable probability that the outcome of petitioner's trial

was affected by his lack of effective counsel.

Petitioner and his wife and their infant daughter spent March 8, 1981 at a family reunion, where petitioner became intoxicated. When they returned home late that afternoon, petitioner retired to the bedroom to play his stereo. Petitioner's father-in-law was watching television in the living room. (Petitioner, his wife Tammie and their infant daughter were living with Tammie's parents to save money for a place of their own.) Tammie's father sent her to the bedroom to tell petitioner to turn down his stereo. Petitioner refused. Petitioner then heard Tammie's father tell her to return to the bedroom and tell petitioner "to cut the goddam stereo down or he'd bust it up." At this point, petitioner went to the bedroom closet and took out his single-shot shotgun and

loaded it with a shell that was "just layin' around." Petitioner then placed the gun on the bed. Tammie entered the room, holding the baby, and petitioner then picked up the gun and cocked it. Tammie asked petitioner what he was going to do with the gun. He replied that he wanted his father-in-law to come in and do what he said he was going to do. Petitioner testified that he then "made a sudden movement ... kind of a twitch." Tammie screamed, "No Frankie, no, don't!" Petitioner testified that he then tried to unbreech the gun and "the gun slipped off and hit the bed and went off." Tammie was struck in the hip by the blast, and bled to death in the hospital. (The baby in her arms was unhurt.)

The only issue in the case was whether the shooting was intentional or accidental. (If accidental, it would have been involuntary manslaughter under South Carolina law.)

At petitioner's murder trial, Detective White testified on three separate occasions that petitioner refused to talk following his arrest, and asked to see an attorney. In closing argument the solicitor argued to the jury that petitioner's postarrest silence and request for an attorney belied his claim that he was distraught and hysterical after the shooting:

> Then they took him back to the sheriff's department, booked 'im and when they tried to talk to 'im, what did Frank say? I want a lawyer. This is a man who was so distraught over his wife, who was incoherent with grief, out of his mind with misery, and he wants a lawyer right away. Was he so out of his mind that he doesn't know to ask for an attorney? He knows he's in trouble. Big trouble. He's

sharp enough to ask for an attorney.

The jury returned once to the courtroom to seek additional instructions as to manslaughter, but convicted petitioner of murder after five hours deliberation.

The District Court granted the petition for habeas corpus, finding that counsel's failure to object to the repeated evidence of petitioner's post-arrest silence and request for an attorney (in violation of Doyle v. Ohio, 426 U.S. 610 (1976)), and failure to object to the closing argument, fell below an objective standard of reasonable representation. [App. 48] After a detailed review of the evidence, the District Court found "that this was a very close case for the jury to decide. Indeed, it is this very closeness which compels the court to conclude that the

petitioner was prejudiced by trial counsel's ineffectiveness. The facts of the case were relatively undisputed and the case turned on the inferences to be drawn from these evidentiary facts. *** [T]he only issue before the jury was whether the petitioner acted with malice aforethought. *** [T]he errors in this case went directly and pervasively to the inferences to be drawn from the trial evidence. [Strickland v. Washington, 466 U.S. 688,] 695-96, 104 S.Ct. at 2069. *** [T]hey went directly to the sole issue in the case, the petitioner's intent at the time he shot his wife. Under these circumstances, the court concludes that there is a reasonable possibility that but for trial counsel's unprofessional errors the result of the proceeding would have been different. [Citation omitted] Unquestionably, the

court's confidence in the outcome of this verdict is undermined." [App. 67-68]

The Court of Appeals did not disagree with the District Court's conclusion that petitioner was denied the effective assistance of counsel. Rather, the Court of Appeals conducted a de novo review of the record, paid no attention to the District Court's factual finding that the constitutional error might well have affected the outcome, and found instead that the Doyle errors and the solicitor's closing argument did not likely affect the verdict.

The Fourth Circuit decided this habeas corpus case in disregard of Rule 52(a) of the Federal Rules of Civil Procedure, which provides that factual findings of the District Court are binding unless clearly erroneous. The District Court's key finding of fact -- prejudice -- could not possibly have been

reversed if the standard of review adopted in Rule 52(a) had been followed. The Court of Appeals did not purport to restrict itself to Rule 52's limited scope of review, despite this Court's express admonition in Strickland v. Washington, 466 U.S. 668 (1984), that Rule 52's "clearly erroneous" standard applies to cases of ineffective assistance. 466 U.S. at 698. The Fourth Circuit reviewed this record as though the District Court had made no findings.

Both components of a claim of ineffective counsel -- ineffective performance, and prejudice -- are mixed questions of law and fact. Id. But the prejudice component is much closer to a purely factual issue than is the ineffective performance component. Evaluating counsel's performance involves consideration of professional norms and the

weighing of judgments, strategies, reasons for choosing one course of action instead of another. Determining prejudice, by contrast, is a matter of assessing whether a reasonable probability exists that a case would have turned out differently if certain clearly identified evidence had been excluded, or the like. The question of whether a trial's outcome might have been affected by counsel's unprofessional conduct is a question best decided by trial judges. That function is clearly assigned to the District Court under Strickland v. Washington, supra. The Courts of Appeals have no authority to decide this peculiarly factual question de novo, as though the District Court had made no findings.

Now that Strickland and following cases have clearly established the elements of an ineffective assistance

case, such cases are mushrooming in number. The Courts of Appeals need to be reminded that the District Court's role, especially in the determination of prejudice, is primary and is not to be disregarded unless its factual findings are clearly erroneous.

II.

The repeated evidence of petitioner's postarrest silence and request to see an attorney -- and especially the use made of that evidence in closing argument -- were the result of ineffective counsel and likely changed the trial's outcome.

Petitioner's trial counsel did nothing to stop or cure the repeated Doyle errors, whether by objection, by motion to strike, by request for curative instructions, or by motion for mistrial or new trial. The Court of Appeals did not disagree with the District Court's conclusion that counsel was not functioning as the counsel contemplated by

the Sixth Amendment. Rather, the Court of Appeals made its own de novo search for prejudice and found none.

The only issue for the jury's determination was petitioner's state of mind at the time of the shooting. Was he guilty of murder? or was his crime involuntary manslaughter? The prosecution's only suggested motive for murder was that petitioner and his wife Tammie had argued about his drinking at the family reunion, earlier that day. (This evidence was contradicted.) As the District Court observed, "it would be a strained conclusion to infer from the trial testimony that the petitioner shot his wife because she told him he was drinking too much." [App. 63]

The Court of Appeals found as a fact that the repeated evidence of silence and request for an attorney did not affect the outcome because petitioner's

"numerous statements to law enforcement personnel and others immediately after the shooting were wholly consistent with his testimony at trial." [App. 14] This reading of the record is clearly erroneous and demonstrates the wisdom of Rule 52(a), which makes the District Court and not the Court of Appeals the finder of fact in the first instance.

Contrary to the finding of the Court of Appeals, not a single witness testified that petitioner gave at the scene the account of how the gun went off which he gave at trial. On the contrary, Deputy Erwin testified that petitioner said he didn't remember pulling the trigger. Deputy Erwin recounted that petitioner stated at the scene that "he remembered loading the shotgun, cocking the shotgun and that's all he remembers." Two witnesses, Douglas Maness and Beth Wells, testified that petitioner said at the

scene that he had shot Tammie. Three witnesses -- Deputy White, Deputy Yarborough, and the ambulance driver, Maness -- denied that petitioner claimed at the scene that the shooting was an accident. A fourth witness, Deputy Erwin, at first testified that petitioner claimed the shooting was accidental, but then recanted.

The jury easily could have inferred that petitioner cooked up the account given at trial after consulting his attorney. The account given at trial was not given by petitioner to any witness at the scene.

The victim's parents testified against petitioner at trial. They wanted to adopt the infant child of petitioner and Tammie, and obviously were much more likely to succeed if petitioner were convicted of murder (20 years minimum

without parole) rather than involuntary manslaughter (three years maximum).

The jury deliberated five hours and requested additional instructions on manslaughter before returning a verdict of murder. The surprising verdict must surely be laid at the door of the solicitor's devastating closing argument, which came about as a result of ineffective assistance of counsel.

CONCLUSION

The Court of Appeals showed no regard for the "clearly erroneous" standard of review set forth in Rule 52. A review of reported decisions in the Courts of Appeals since this Court's 1984 decision in Strickland v. Washington, supra, shows that ineffective assistance cases are routinely being decided by the Courts of Appeals based upon their own view of the facts. This may be appropriate where the

question is whether counsel was ineffective. But when it comes to the second part of the inquiry -- prejudice -- the question is more one of fact than of law. Would the outcome of the criminal trial likely have differed, but for counsel's unprofessional errors? This is a question which trial judges are best suited to answer. Rule 52(a) confides that determination in the first instance to the District Court.

The Fourth Circuit reached a plainly wrong decision when it disregarded Rule 52(a) and misread the factual record of this case.

For these reasons petitioner urges the Court to grant the writ.

Respectfully submitted,

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Attorney for Petitioner.

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-7112

FRANK DURANT JEFFERS

Petitioner - Appellee

v.

WILLIAM D. LEEKE; T. TRAVIS MEDLOCK, Attorney General of South Carolina

Respondents - Appellants

Appeal from the United States District Court for the District of south Carolina, at Columbia. Clyde H. Hamilton, District Judge. (CA-3:86-309)

Argued: November 5, 1987
Decided: December 15, 1987

Before SPROUSE and WILKINS, Circuit Judges, and BOYLE, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Donald J. Zelenka, Chief Deputy Attorney General, (T. Travis Medlock, Attorney General; William A. Ready, III, Assistant Attorney General on brief) for Appellants; James B. Richardson, Jr. for Appellee.

WILKINS, CIRCUIT JUDGE:

The State of South Carolina appeals from the issuance of a writ of habeas corpus for state inmate Frank Jeffers on the ground of ineffective assistance of counsel at trial. We reverse and remand with directions to dismiss the petition.

I.

On March 8, 1981 Petitioner Frank Jeffers shot and killed his wife Tammie during a family quarrel at the home of her parents with whom they lived. Testimony at trial showed that on the day of the shooting, Petitioner and Tammie attended a party where he smoked marijuana and became intoxicated. After returning home, Petitioner went to their bedroom and turned on the stereo. His father-in-law told Tammie to tell Petitioner to turn down the volume or he would "bust it." Three witnesses testified that after Tammie entered the

bedroom, she screamed "No, Frankie, no, don't do it." Immediately thereafter they heard a single gunshot and ran to the room where Tammie was found lying on the floor bleeding. The father-in-law testified that Petitioner was still holding the gun when he entered the room. The mother-in-law and sister-in-law testified that Petitioner ran from the room screaming that he "didn't mean to do it." Tammie died at a hospital several hours later.

Petitioner admitted that he shot his wife, but contended that it was an accident. He testified that when he heard his father-in-law threaten to "bust" his stereo, he took a shotgun from the closet, loaded it, and placed it on the bed. When Tammie entered the bedroom, he picked up the gun and cocked it. Petitioner further testified that Tammie screamed in response to a sudden movement

he made while holding the gun. He claimed that he then attempted to breech the gun, but it fell to the bed and discharged accidentally.

The gun in question was a single barrel, .12 gauge, breech-loading shotgun. A firearms expert testified that the gun was a very safe weapon and that it was in normal operating condition. He stated that the gun would not breech if cocked. The expert further testified that from examination of the discharged shell, the gun had been completely cocked when fired at Tammie.

Petitioner maintained that he and Tammie were happily married. However, testimony was offered that they had argued at the party about his drinking. Petitioner denied arguing with her and several family members present at the party testified that they had heard no argument.

There was additional testimony that after initially running from the scene, Petitioner returned and fought with his father-in-law in an attempt to reenter the house. After the fight, he again ran from the scene, flagged down a responding ambulance and directed it to the house.

After Petitioner was arrested at the scene and twice advised of his rights, he told two officers that he did not intend to shoot his wife and asked them to kill him. The officers also testified that he was upset and virtually incoherent at that time. While he was being transported to the hospital for treatment of injuries sustained during the fight with his father-in-law, he told another officer that the shooting was an accident, despite a reminder that he had been read his rights. After he was taken to the local law enforcement center and

again advised of his rights, he requested an attorney.

During the trial, two responses by a state witness referred to Petitioner's post-arrest silence at the law enforcement center and request for counsel, without objection from defense counsel. The first response occurred during direct examination of the investigating officer:

> Q: Did you have occasion to see [Petitioner] after he got back to the jail?
>
> A: Yes, sir. It's normal procedure after a person has been booked in, if it's a case I've been assigned to, I get the person and bring 'em back down to my office and talk to em. I talked to him; I advised him of his rights; and he refused to talk to me and requested an attorney be present.

The second comment was made by the same investigating officer on recross-examination:

> Q: Did you ask him where he was going when he was wandering four blocks away?

A: When I talked to Frankie he indicated that he wanted an attorney.

Also, during closing argument the solicitor stated:

> Then they took him back to the sheriff's department, booked 'im and when they tried to talk to 'im, what did Frank say? I want a lawyer. This is a man who was so distraught over his wife, who was incoherent with grief, out of his mind with misery, and he wants a lawyer right away. Was he so out of his mind that he doesn't know to ask for an attorney. He knows he's in trouble. Big trouble. He's sharp enough to ask for an attorney.

The jury found Petitioner guilty of murder and he was sentenced to life imprisonment. His conviction was affirmed on appeal to the South Carolina Supreme Court under Rule 23 of the Rules of Practice of that court. State v. Jeffers, Memo. Op. No. 83-MO-111 (May 20, 1983).

Petitioner filed an application for post-conviction relief in state court in August 1983, alleging ineffective assistance of counsel arising from defense counsel's failure to object to the three comments on his post-arrest silence and request for counsel. At an evidentiary hearing, defense counsel testified that his failure to object was a general tactical decision to make very few objections so that the trial would "go as smoothly as possible," believing that under the facts of the case this would be in his client's best interests. The state circuit court denied relief and dismissed the application, finding that defense counsel's tactical decision not to object was harmless beyond a reasonable doubt. A petition for a writ of certiorari was denied by the state supreme court in August 1985.

Petitioner then filed a petition for a writ of habeas corpus in federal court under 28 U.S.C.A. § 2254 (West 1977). The magistrate to whom the case was initially assigned recommended that the petition be denied, finding that the failure to object was a tactical decision and that the evidence did not undermine confidence in the outcome of the trial. The district court rejected the recommendation and issued the writ, finding that Petitioner had been denied effective assistance of counsel.

II.

The sixth amendment guarantees the right to effective assistance of counsel. Strickland v. Washington, 446 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)). The benchmark for judging a claim of ineffective assistance of counsel is "whether counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. In Strickland, the Court established a two-prong test for determining whether assistance of counsel was so defective as to require reversal of a conviction. First, the defendant must establish that counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms. Id. at 687-88. Second, he must establish that the deficient performance prejudiced the defense to the extent that he was deprived of a fair trial. Id. at 687.

A.

In asserting a claim of deficient performance, the defendant must identify the acts or omissions of counsel which he alleges were not the result of reasonable

professional judgment. Id. at 690. The court must determine, in light of all the circumstances, whether the identified acts or omissions were outside the wide range of professionally competent assistance. Id. Judicial scrutiny of counsel's performance is highly deferential and indulges a strong presumption that counsel rendered adequate assistance. Id. at 689. The defendant must rebut the presumption that the challenged action was sound trial strategy under the circumstances. Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Petitioner asserts that his defense counsel's performance was deficient in failing to object to the comments on his post-arrest silence and request for counsel which were improper under Doyle v. Ohio, 426 U.S. 610 (1976). In Doyle, the Court held that use of a defendant's

silence after being advised of his rights for impeachment purposes is a violation of due process. Id. at 619. While we seriously question the soundness of defense counsel's tactical decision not to object,[1] we need not address the question of whether his performance was deficient, for we conclude that Petitioner has not established prejudice. Strickland, 466 U.S. at 697; Whitley v. Bair, 802 F.2d 1487, 1494 (4th Cir. 1986), cert. denied, 94 L.Ed.2d 802 (1987).

B.

To establish prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

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[1] Counsel for Petitioner on this appeal did not represent him at trial.

reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Considering the totality of the evidence before the jury, we find that there is not "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695. While Petitioner may not have been afforded a perfect trial, he was given a fair trial, free of prejudicial error. See United States v. Hasting, 461 U.S. 499, 508-09 (1983).

No special attention was directed to the two testimonial comments on Petitioner's post-arrest silence and request for counsel at the time they were made. The comment on recross-examination of the investigating officer was immediately clarified by testimony that Petitioner only requested counsel "after awhile, but at first when [the officer] talked to

him, he was just upset." The subject was not mentioned during cross-examination of Petitioner. During closing argument, the prosecutor argued that Petitioner's silence and request for counsel were inconsistent with his assertions of having been distraught and incoherent with grief over the shooting. Any potentially negative impact from these comments was diminished by extensive evidence that from the moment it occurred, Petitioner did appear to be upset and was persistent in his claim that the shooting was an accident. His numerous statements to law enforcement personnel and others immediately after the shooting were wholly consistent with his testimony at trial. We find no reasonable probability that but for the comments, the jury would have had a reasonable doubt as to his guilt.

In Doyle, the petitioners were arrested for selling marijuana to a local drug informant. They admitted virtually everything about the state's case, but for the first time at trial, asserted that they were framed, claiming that they were making a purchase from the informant. On cross-examination of the petitioners, the state sought to impeach their testimony by asking why they had not made this claim to the law enforcement agent at the time they were arrested.

One of the reasons the Court found a violation of fundamental fairness in Doyle was that petitioners' post-arrest, pretrial silence could have indicated either that they were exercising their right to remain silent or that the defense was a recent fabrication. Doyle, 426 U.S. at 616-17; see also Williams v. Zahradnick, 632 F.2d 353, 360 (4th Cir.

1380). However, here, the comments could not have reasonably "plant[ed] in the mind of the jury the dark suspicion that the defendant had something to hide, and that any [defense] which [was] subsequently proffered [was] pure fabrication," Alston v. Garrison, 720 F.2d 812, 818 (4th Cir. 1983), cert. denied, 466 U.S. 1213 (1984), in view of Petitioner's continuous and consistent assertions of an accident defense.

We also find any error was harmless under the five-prong test established in Williams v. Zahradnick, 632 F.2d at 361-62, for determining the prejudicial effect of a Doyle error. Although the prosecution improperly elicited and made comments on Petitioner's post-arrest silence and request for counsel to counter his claim of accident and no curative instructions were given due to

the absence of objection, the three references were harmless in view of the extensive testimony that from the time of the shooting continuing through trial he consistently asserted the defense of accident. They were also harmless in view of the quantum of other evidence indicative of his intent.

REVERSED AND REMANDED.

APPENDIX "B"

FILED
JAN. 20, 1988

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 87-7112

Frank Durant Jeffers
Petitioner - Appellee

versus

William Leeke, et al,
Respondents - Appellants

On Petition for Rehearing with Suggestion for Rehearing In Banc.

O R D E R

The appellant's pro se petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkins, with the concurrence of Judge Sprouse and Judge Boyle, United States District Judge, sitting by designation.

For the Court,

/s/ JOHN M. GREACEN
CLERK

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FRANK DURANT JEFFERS, Petitioner, v. WILLIAM D. LEEKE, COMMISSIONER OF SCDC, AND TRAVIS MEDLOCK, ATTORNEY GENERAL OF SOUTH CAROLINA, Respondents.	C/A NO. 3:86-309-15J ORDER

The petitioner, a state prisoner, has filed the present action seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. The petitioner alleges that he received ineffective assistance of counsel at his state court trial. This matter is presently before the court upon respondents' motion for summary judgment

filed March 27, 1986. Rule 56, Fed. R. Civ. Proc. The petitioner filed his opposition to the motion on May 5, 1986.[1] The matter was then referred to United States Magistrate Robert S. Carr, pursuant to 28 U.S.C. § 636(b)(1)(B) and this court's order of May 7, 1977. On August 14, 1986, Magistrate Carr issued his report and recommendation wherein he recommended that the respondents' motion for summary judgment be granted. The petitioner, through his attorney, James B. Richardson, Jr., Esquire, filed objections to the magistrate's report and recommendation on September 4, 1986. Pursuant to 28 U.S.C. § 636(b)(1)(C) the court must make a de novo determination

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[1] By order of April 1, 1986, the petitioner was fully advised of his right to oppose the motion for summary judgment. He was specifically advised of the consequences of his failure to oppose the motion. Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1979).

of those portions of the magistrate's report and recommendation to which the petitioner has objected. Camby v. Davis, 718 F.2d 198 (4th Cir. 1983). After reviewing the magistrate's report and recommendation, the petitioner's objection thereto and the applicable law, the court concludes that it cannot accept the magistrate's recommendation for the reasons which follow.

BACKGROUND

In October of 1981, the petitioner was convicted of murdering his wife and sentenced to life imprisonment. The petitioner was represented in his trial by H. Patterson McWhirter, Esquire, Public Defender for Lexington County. The petitioner's subsequent appeal to the South Carolina Supreme Court was affirmed in May of 1983. State v. Jeffers, Memo. Op. No. 83-MO-111 (Filed May 20, 1983).

The petitioner then sought post-conviction relief in the state court alleging "Ineffective assistance of counsel prior to and during trial by failing to object to certain evidence offered, and certain trial errors committed by the court." In July of 1984, an evidentiary hearing regarding the matter was held in state court. The petitioner and his appointed counsel, Kellum Allen, Esquire, were present at the hearing and identified four matters as constituting "certain evidence" to which trial counsel should have objected.

The first portion of the transcript called to the court's attention involved the solicitor's direct examination of the investigating officer, Detective White, concerning his attempted interrogation of petitioner on the night of his arrest.

The exchange was as follows:

> Q: Did you have occasion to see him after he got back to the jail?
>
> A: Yes, sir. It's normal procedure after a person has been booked in, if it's a case I've been assigned to, I get the person and bring 'em back down to my office and talk to 'em. I talked to him; I advised him of his rights; and he refused to talk to me and requested an attorney be present.
>
> Q: Did you interrogate him any further?
>
> A: No sir. I turned him back to the jail sergeant.

Transcript, p. 65, l.22 - p. 66, l.6.[2]

The second portion of the transcript called to the court's attention referenced cross-examination of Detective White, as follows:

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[2] All transcript page references are derived from the April 11, 1986, appendix to the respondents' motion for summary judgment.

Q: I believe Mr. DuTrimble asked you if Frankie ever told you it was an accident. Did he?

A: No sir.

Q: But he did tell you that he didn't mean to hurt his wife?

A: Yes sir.

Transcript, p. 70, l.18-22.

The third portion of the transcript noted involved the re-cross-examination of Detective White:

Q: Did you ask him where he was going when he was wandering four blocks away?

A: When I talked to Frankie he indicated that he wanted an attorney.

Q: That was after awhile, but at first when you talked to him, he was just upset.

A: Yes sir.

Transcript, p. 83, l.14-20.

Finally, the petitioner noted a portion of the solicitor's closing

argument in which the solicitor stated:

> Then they took him back to the sheriff's department, booked 'im and when they tried to talk to 'im, what did Frank say? I want a lawyer. This is a man who was so distraught over his wife, who was incoherent with grief, out of his mind with misery, and he wants a lawyer right away. Was he so out of his mind that he doesn't know to ask for an attorney. He knows he's in trouble. Big trouble. He's sharp enough to ask for an attorney.

Transcript, p. 223, l.17-23.

Subsequent to the evidentiary hearing, the Honorable Larry Patterson, Special Circuit Judge, issued a written order dismissing the petitioner's allegations as without merit. In his order, Judge Patterson found as a fact that trial counsel's failure to object to the introduction of the references to petitioner's request for counsel and post-arrest silence was a tactical decision. The petitioner subsequently sought and was denied a Writ of Certiorari from the

South Carolina Supreme Court. The instant petition for habeas corpus followed that denial of certiorari.

After the parties submitted pleadings addressing the petition, Magistrate Carr issued his report and recommendation. He cited two primary grounds for recommending that the respondents' motion for summary judgment be granted. First, Magistrate Carr stated that "this court is bound by the state court's finding of historical fact that trial counsel's failure to object to comments concerning the petitioner's request for counsel was a tactical decision. 28 U.S.C. § 2254(d), Sumner v. Mata, 255 U.S. 591 (1982). Accordingly, since the courts are reluctant to second guess tactics of trial lawyers this petition should be dismissed. Goodson v. United States, 564 F.2d 1071, 1072 (4th Cir. 1977)." (Magistrate's Report and Recommendation,

p. 8). While recommending that the petition be dismissed on the above ground, the magistrate conducted further review of the petition, "[B]ecause of the insidious nature of unchallenged prosecutorial exploitation of constitutionally protected post-arrest silence." Id. at p. 8. Magistrate Carr then applied the test for ineffective assistance of counsel found in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), and found that the petitioner was not denied the effective assistance of counsel. (Magistrate's Report and Recommendation pp. 9-11). On September 4, 1986, the petitioner, through his attorney, James B. Richardson, Jr., Esquire, filed objections to the magistrate's report and recommendation.

PETITIONER'S OBJECTIONS

The petitioner's first objection is that the magistrate erred by accepting

the state court's finding of fact, i.e., that trial counsel's failure to object to evidence of petitioner's request for counsel constituted a tactical decision. The petitioner argues that trial counsel's explanation for his failure to object "fails to support a finding of a reasoned tactical decision by trial counsel." (Petitioner's Objections to Magistrate's Report and Recommendation, p. 1).

> 28 U.S.C. § 2254(d) requires federal courts in habeas proceedings to accord a presumption of correctness to state-court findings of fact ... The statute explicitly provides that 'a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction ... shall be presumed correct.' Only when one of seven specified factors is present or the state court finding 'is not fairly supported by the record' may the presumption be properly viewed as inapplicable or rebutted. Sumner v. Mata, 255 U.S. 591, 591-592, 102 S.Ct. 1303, 1304 (1984). (footnotes omitted).

The court, having reviewed the entire record of the case and the state court evidentiary hearing of July 25, 1984, finds no reason to disagree with the state court's finding that trial counsel's failure to object to certain evidence[3] was a tactical

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[3] At the evidentiary hearing of July 25, 1984, the petitioner directed the court's attention to four portions of the transcript, p. 65, 1.22 - p. 66, 1.6, p. 70, 1.18-22, p. 83, 1.14-20 and p. 223, 1.17-23. The court, having reviewed the petitioner's habeas corpus petition, the memorandum in opposition to the State's motion for summary judgment and the petitioner's objections to the magistrate's report, must conclude that the petitioner has abandoned his claim that trial counsel's failure to object to the introduction of evidence delineated on Transcript, p. 70, 1.18-22, constituted ineffective assistance of counsel. The court reaches this conclusion because the petitioner make no reference to this evidence in any of the above referenced materials. This was confirmed in a telon with petitioner's counsel, James B. Richardson, Jr., Esquire. Consequently, references to "certain evidence" conained in the dispositive portion of this order refer only to the evidence introuced at Transcript, p. 65, 1.22 - p. 66, 1.6; p. 83, 1.14-20 and p. 223, 1.17-23.

decision.[4] However, merely denominating trial counsel's decision a trial tactic does not resolve the ineffectiveness of counsel claim because such a claim is a mixed question of law and fact.[5] Strickland v. Washington, 466 U.S. 668,

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[4] Petitioner's second objection, i.e., that the magistrate erred by finding that trial counsel's failure to object to certain evidence was a tactical decision, is without merit. The magistrate made no independent finding of fact regarding this matter; rather, he accepted the state court's finding of fact.

[5] Ordinarily, courts reviewing an ineffectiveness of counsel claim should not second guess strategic decisions of counsel. Strickland, 466 U.S. at 689-690, 104 S.Ct. at 2065-66. Additionally, the defendant, in pursuing his claim must overcome the presumption that the challenged actions of counsel might be considered sound trial strategy. Id. at 689, 104 S.Ct. at 2066. (emphasis added) However, counsel is not insulated from a finding that his performance was ineffective merely by classifying the challenged actions or inactions as trial strategy. Hoots v. Allsbrook, 785 F.2d 1214, 1219-1220 (4th Cir. 1985).

698, 104 S.Ct. 2052, 2070 (1984). Therefore, review of petitioner's remaining objections must take place in light of the standard for analyzing ineffectiveness of counsel claims articulated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Strickland requires,

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders a result unreliable. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

In applying the above test the court must decide whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068.

Strickland does not prescribe a "bright-line" rule for determining the ineffectiveness of counsel, but rather, it makes clear that a case by case analysis, in light of the then existing circumstances, must take place. Id. at 690, 104 S.Ct. at 2068.

> [Therefore], a convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine

> whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. at 690, 104 S.Ct. at 2066.

In view of the above, and with due regard for the admonition that, "judicial scrutiny of counsel's performance must be highly deferential", Id. at 689, 104 S.Ct. at 2065, the court finds that trial counsel's performance, in view of his failure to object to evidence heretofore delineated,[6] fell below an "objective

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[6] See footnote 3.

standard of reasonableness." Id. at 688, 104 S.Ct. at 2065.

TRIAL COUNSEL'S ERRORS

In this case, trial counsel failed to object to references to petitioner's constitutional rights to silence and counsel.[7] The parties agree that Detective White's references to the petitioner's constitutional right to silence, Transcript, p. 66, l.2-4, constituted a violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) and Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976). However, respondents contend that the solicitor's reference to the petitioner's request for counsel is not a

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[7] The petitioner, in his objection, alleges that each such reference constitutes a violation of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976).

"technical" violation of Doyle. (State's Return, p. 8). While the court agrees that such a reference may not be a technical violation of Doyle, it is still violation of the petitioner's constitutional rights of the same magnitude as a Doyle violation. As Miranda makes clear, a defendant is afforded the right to silence in order to protect his privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 472, 86 S.Ct. 1602, 1627 (1966). In order to protect the privilege against self-incrimination, defendants are afforded the constitutional right to counsel. Id. Therefore, the right to counsel and the right to silence are rights of equal constitutional significance. Consequently, respondents' contention, that reference to the petitioner's request for counsel is somehow a lesser violation of the petitioner's constitutional right, is

without merit. Finally, respondents argue that the reference to the petitioner's invocation of his right to counsel, (Transcript, p. 83, 1.14-20), is merely "reference to statements made by the petitioner [and] did not violate his constitutional rights under Doyle v. Ohio." (State's Return, p. 7). The court agrees that the response did not directly reference petitioner's right to silence under Miranda and Doyle. Doyle, addressed the situation wherein the prosecutor uses evidence of the defendant's post-arrest silence against him. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (4th Cir. 1976). However, as was made clear in Alston v. Garrison, 720 F.2d 812, 814, 815 (4th Cir. 1983), Doyle error can occur during cross examination by defense counsel. In Alston, the defense counsel,

during cross examination of the investigating detective (Burns), elicited the following response:

> Mr. Alston started to talk after I read him his constitutional rights, and then he stood on his rights. He shut up. He said I want a lawyer. Right away, I respected his wishes. Id. at 815.

The court found a Doyle error occurred in this instance. This court finds the statement by Detective White, "When I talked to Frankie he indicated he wanted an attorney", (Transcript, p. 83, l.16-17), markedly similar to the statement of Detective Burns in Alston. However, because there is not a direct reference to the petitioner's silence, the court cannot clearly categorize this statement as a Doyle, error. Nevertheless, even if Detective White's statement is not a per se violation of Doyle, it was an unconstitutional violation of the petitioner's

rights equal in magnitude to a Doyle, error.[8]

Given that the petitioner's constitutional rights were violated three times, by the introduction of certain evidence, the court must decide whether trial counsel's failure to object to such evidence constituted ineffective assistance of counsel.

TRIAL COUNSEL WAS INEFFECTIVE

> Few mistakes by criminal defense counsel are so grave as the failure to protest evidence that the defendant exercised his right to remain silent. See Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); Williams v. Zahradnick, 632 F.2d 353 (4th Cir. 1980). Such evidence plants in the mind

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[8] The court reaches this conclusion for the reasons discussed at pages 9-10 of this order. Additionally, the court notes that the only reasonable inference to be drawn from Detective White's statement, given its context, is that the petitioner stood on his constitutional right to remain silent.

of the jury the dark suspicion that the defendant had something to hide, and that any alibi which is subsequently proffered is pure fabrication. The Supreme Court best stated these concerns in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), holding that comment on a defendant's post-arrest silence violated due process of law:

> The warnings mandated by [Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966),] ... contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. Id. at 426 U.S. at 617-18, 96 S.Ct. at 2244-45 (citations and footnotes omitted). Alston v. Garrison, 720 F.2d 812, 816 (4th Cir. 1983), cert. denied 468 U.S. 1219, 104 S.Ct. 3589 (1984).

As noted, the parties agree that the reference to petitioner's post-arrest silence, Transcript, p. 65, 1.22 - p. 66, 1.6, was a clear Doyle violation. Consequently, the concerns expressed above are directly applicable in the present case. Additionally, for reasons previously stated, the damage done by the solicitor's reference to the defendant's invocation of his right to counsel, (Transcript, p. 83, 1.16-17 and p. 223, 1.17-23), raises similar concerns to those expressed in Doyle. These concerns are particularly relevant in the case at hand because the petitioner admitted killing his wife, but alleged that the killing was an accident. Therefore, the only issue before the jury was defendant's intent. The argument of the solicitor directly addressed this issue and can reasonably be interpreted to infer that the defendant had the requisite

intent to commit murder. Transcript, p. 223, 1.17-23. The solicitor obviously drew upon the earlier reference to defendant's request for counsel in making this argument. Transcript, p. 83, 1.16-17.

In Alston v. Garrison, 720 F.2d 812 (4th Cir. 1983), the court was presented with an ineffectiveness of counsel claim on facts relatively similar to this case. Three unobjected to references were made to the defendant's invocation of his Miranda rights. The first reference occurred on direct examination of the investigating detective by the North Carolina prosecutor, wherein the following colloquy took place:

> Q: After advising him of his constitutional rights did you talk with him at all?
>
> A: Well, sir, he stood on his constitutional rights.
>
> Q: In other words, he didn't say anything to you at that time, did he?

A: He started to converse, sir, and then he just shut up and he said I want my lawyer and we abided by his wishes.

Id. at 815.

The second reference occurred during cross-examination of the same detective by the defendant's counsel.

> In cross-examination of Detective Burns, Alston's lawyer asked what had prompted the police to designate Alston as the chief suspect in the case. Burns gave four reasons:
>
> . . .
>
> (4) he did not give any statement concerning - I would say his activities on the date of the 30th of December, 1976. As I stated, he stood on his constitutional rights. (emphasis in original deleted) Id.

The final reference occurred later during the same cross-examination when Detective Burns, the investigating detective, described his encounter with the defendant as follows: "Mr. Alston started to talk after I read him his constitutional rights, and then he stood on

his rights. He shut up. He said I want a lawyer. Right away, I respected his wishes." Id.

The court held that, given the seriousness of any reference to post-arrest silence, trial counsel's performance was undisputedly incompetent, and that the defendant was denied the effective assistance of counsel. Id. at 816. Additionally, in Alston the prosecutor did not capitalize upon inadmissible evidence in his closing argument. Obviously, emphasizing such evidence in closing argument, as in this case, serves only to magnify the error and increase the need for defense counsel to object. Passman v. Blackburn, 797 F.2d 1335, 1347 (5th Cir. 1986). Therefore, given the apparent similarities between this case and Alston, it would appear mandated to conclude that trial counsel's performance was ineffective. However, in the instant

case, trial counsel asserts that his failure to object to the previously delineated evidence was a matter of trial strategy. In gist, trial counsel's strategy was:

> [T]o have as little confusion as possible and try to look like we were not trying to hide anything and that we were open and honest because it was a major part of our defense that Frankie loved his wife and regretted that this thing occurred which I hoped and thought that the jury would believe. So we wanted to go as smoothly as possible. Transcript, p. 278, l.8; see also p. 278, l.20 - p. 279, l.2 and p. 280, l.8 - p. 281, l.1.

Alston did not address what, if any, role trial strategy considerations play in the analysis of an ineffective assistance of counsel claim. However, the United States Supreme Court in Strickland stated:

> Judicial scrutiny of counsel's performance must be highly deferential ... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects

> of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances the challenged action 'might be considered sound trial strategy.' See Michel v. Louisiana, supra, at 101. Strickland v. Washington, 466 U.S. at 689, 104 S.Ct. at 2067-2068 (emphasis added).

Having reviewed the entire record in this case, the court finds that trial counsel's failures to object to certain evidence cannot be considered sound trial strategy. Initially, the court notes that trial counsel interposed objections in this case on issues of considerably lesser constitutional significance. See, e.g., Transcript, p. 52, l.23 - p. 53, l.6 (objection to reference to prior arrest), p. 114, l.24-25 (objection to

witness' speculation as to the storage location of a shotgun). Transcript, p. 160, l.13-14 (objection to improper impeachment).

Additionally, on occasion, the jury was excused, at the defendant's request, in order to take up potentially damaging matters, thereby further breaking up the "smoothness of the trial". See, e.g. Transcript, p. 85, l.8-9, and p. 156, l.21-22.

Finally, trial counsel asserted that he failed to object to the solicitor's closing argument because, "It had all been brought out in the case." Transcript, p. 280, l.17-18. He, also, stated that "The statement [of the solicitor] was consistent with the testimony that came out in the trial although it's exaggerated, and that's part of his job." Transcript, p. 280, l.24 - p. 281, l.1. The above reasons do

not satisfactorily explain the failure to object to the solicitor's closing argument, and cannot reasonably be ascribed to a sound trial strategy. The solicitor's argument changed the patently neutral nature of the comments at Transcript, p. 65, 1.22 - p. 66, 1.6, and p. 83, 1.14-20 and transformed them into inferences of the defendant's guilt. Given these circumstances, it is inconceivable that trial counsel's failure to object could be attributed to a sound trial strategy. Therefore, in light of the inconsistent manner in which trial counsel employed his asserted trial strategy and based upon the previously cited authorities, the court is constrained to conclude that trial counsel's "representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688, 104

S.Ct. 2052, 2065 (1984). Consequently, the petitioner was denied the effective assistance of counsel.[9]

THE PETITIONER WAS PREJUDICED BY TRIAL COUNSEL'S ERROR

Having determined that the petitioner was denied the effective assistance of counsel, the court now addresses whether

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[9] Both parties have suggested that the constitutional errors which have occurred in this case should be analyzed under the "harmless beyond a reasonable doubt" standard of United States v. Hastings, 461 U.S. 499, 510-511, 103 S.Ct. 1974, 1981. The petitioner, in his objections, also argues that the court should apply the "five point analysis set forth in Wilhams v. Zahradnick, 632 F.2d 353 (4th Cir. 1980), in determining whether the Doyle error was harmless." (Petitioner's objection to the Magistrate's Report and Recommendation p. 2). The court has not elaborated upon this analysis; however, for the reasons which follow in the body of this order, it is clear that the constitutional errors which occurred in this case were not harmless beyond a reasonable doubt.

counsel's "deficient performance prejudiced the defendant." Id. at 687, 104 S.Ct. at 2064. To prevail on his claim of prejudice the petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068. The court must decide whether there is a "reasonable probability that absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Strickland, Id. at 695, 104 S.Ct. at 2069. In making this determination the court must evaluate the totality of the evidence before the jury. Id.

With the above guidelines for evaluating prejudice, the court now turns to the case at hand. The petitioner was

convicted of murder. He admitted shooting his wife with his shotgun; however, he argued that the shooting was an accident. Transcript, p. 149, 1.4-10. Petitioner's version of the facts leading up to the shooting is as follows: He was a loving husband and father who was living with his in-laws in an effort to save money for a place of his own. Transcript, p. 129-134. During the morning and early afternoon hours of March 8, 1981, the petitioner, his wife and infant daughter visited various friends and relatives. Transcript, p. 140-143. During this period, the petitioner smoked some marijuana and drank a significant amount of alcohol. Transcript, p. 142, 1.10-11, p. 142, 1.25 - p. 143, 1.1. The petitioner and his family then returned home and he went into his bedroom to listen to music. Transcript, p. 146, 1.12. Shortly thereafter, the

petitioner increased the volume of his stereo in order to overcome television noise from the adjoining room. Transcript, p. 146, 1.14-15. He then overheard his father-in-law "[T]ell Tammie [petitioner's wife] to come in there and tell me [petitioner] to cut the goddam stereo down or he'd bust it up." Transcript, p. 146, 1.21-22.[10] At this point, the petitioner went to the bedroom closet and took out his single-shot shotgun. Transcript, p. 147, 1.16. He then loaded the shotgun with a shell that was "just layin' around (sic)." Transcript, p. 164, 1.21. The petitioner then placed the gun on the bed. His wife entered the

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[10] The petitioner's wife had, at the request of her father, previously asked the petitioner to lower the volume of the music.

room, holding the baby, and the petitioner then picked up the gun and cocked it. Transcript, p. 167, 1.23. His wife asked him what he was going to do with that gun, and the petitioner replied he wanted his father-in-law to come in and do what he said he was going to do. Transcript, p. 165, 1.2-5. The petitioner then "made a sudden movement ... kind of a twitch." Transcript, p. 167, 1.13-15. His wife screamed, "No Frankie, no, don't". The petitioner then tried to unbreech the gun and "the gun slipped off and hit the bed and went off." Transcript, p. 149, 1.4-5, p. 167, 1.17. The petitioner stated the gun was not pointed in a safe direction because he was drunk. Transcript, p. 168, 1.14. The petitioner's father-in-law then entered the room and told the petitioner he "better get outa' there." Transcript, p.

149, 1.24-25. The petitioner then ran from the house to seek help for his wife.[11] Transcript, p. 150, 1.1-3.

If the petitioner's story is believed, it would have been reasonable for the jury to conclude that the shooting of the petitioner's wife was an accident. However, "Respondents contend that the quantum of other evidence indicative of guilt was overwhelming, that Petitioner's exculpatory story was totally implausible and that it is clear beyond a- reasonable doubt that the jury would have returned a verdict of guilty absent evidence of Petitioner's silence. A complete and thorough reading of the transcript indicates that Petitioner's defense of accident was totally implausible. Petitioner's statements

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[11] The baby was not injured in the shooting.

contained numerous discrepancies and contradictions and his actions and statements prior to and after the homicide further indicate overwhelming guilt beyond a reasonable doubt."[12] Respondents' Return, p. 11 (emphasis added).

The court has conducted a "complete and thorough reading of the transcript" and cannot agree with the respondents' conclusion. As has been previously stated, the petitioner admitted shooting his wife, however, he contended that the shooting was an accident. Under these circumstances, and as regards the charge

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[12] Respondents assert that the petitioner's statement of the facts contains "numerous discrepancies and contradictions." However, respondents have neither referenced nor delineated these alleged discrepancies and contradictions for the court's review. But see, Magistrate's Report and Recommendation, p. 10 "[The petitioner's] testimony contradicts testimony from the state only with regard to whether the petitioner and his wife had recently fought." (emphasis added)

of murder, the only issue before the jury was whether or not the petitioner acted with malice aforethought.[13] S.C. Code Ann. § 16-3-10 (Law. Co-Op 1976). The solicitor's argument went directly to this issue and unambiguously inferred that the petitioner's invocation of his constitutional rights was indicative of his criminal intent. Transcript, p. 223, l.17-23. Trial counsel's failure to object under these circumstances was clearly error. However, "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the evidentiary picture, and some will have had an isolated, trivial effect." Strickland, at 695-696, 104 S.Ct. at 2069.

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[13] For the sake of brevity further discussion of this issue will reference the petitioner's intent.

For the reasons which follow, the court concludes that trial counsel's errors had a pervasive effect on the inferences to be drawn from the evidence and significantly altered the evidentiary picture.

Obviously, the petitioner's intent was an element of the crime which could be proved only by circumstantial evidence. The significant items of evidence which may have indicated that the petitioner acted with malice aforethought were as follows:[14] Three (3) witnesses

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[14] The listing of these evidentiary items should not be construed to imply that the entire record has not been considered by the court. The record of this case has been laboriously reviewed. However, because the respondents will undoubtedly point out evidence which they believe the court has failed to consider, the court desires to make it clear that the evidence delineated was not the only evidence considered by the court. These items are, however, representative of the nature of the evidence presented in the case and tended to be the dominant areas of the trial.

testified that before the petitioner's wife was shot she screamed "No, Frankie, no, don't do it." Transcript, p. 110, l.12, (Beth Wells, decedent's sister), p. 112, l.16 (Mrs. Wells, decedent's mother), p. 116, l.6-7 (Mr. Wells, decedent's father).[15] Additionally, the state offered evidence tending to show that the petitioner and his wife had an argument on the day of the shooting. Transcript, p. 204, l.5-13. Also, Dan De Freese, a firearms expert with the South Carolina Law Enforcement Division, testified that in his opinion, "within this class of weapon, this is a very, ah, safe weapon. It does operate in the way it's

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[15] The petitioner's testimony differed slightly in that he states his wife screamed, "No, Frankie, no don't." Transcript, p. 149.l.4.

intended and it's obvious the manufacturer had safety in mind when he designed it because this gun does tend to correct a number of faults which have occurred with older single barrel shotguns." Transcript, p. 108, 1.19-23. Mr. De Freese also stated that he did not think, even assuming the gun was cocked, that there was a chance "you could slip off the safety and hit the trigger". Transcript, p. 108, 1.2-4.

During trial, the petitioner asserted that his reason for getting the shotgun was to scare his father-in-law, who had threatened to bust up his (the petitioner's) stereo. Transcript, p. 165, 1.14. However, the petitioner could offer no reason why this avowed purpose also required the loading and cocking of

the shotgun. Transcript, p. 165, l.11-18, p. 167, l.24 - p. 168, l.3.[16]

Finally, Mr. Wells testified that when he entered the bedroom in response to the shotgun firing, "He [the petitioner] threw down the gun, pushed me out of the way and jumped over Tammie [the decedent] and ran for outside." Transcript, p. 116, l.23-25. This evidence was most likely offered to show that the petitioner's first instinct was to flee the shooting scene.

However, the petitioner countered the state's evidence with evidence which tended to support his accidental shooting theory. The petitioner stated that his wife screamed, "No, Frankie, no, don't."

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[16] The inferences to be drawn from this item of evidence could easily support a conviction for involuntary manslaughter or murder. They are in no way dispositive of this case.

in response to a sudden movement he made with the gun. Transcript, p. 149, l.2-4 and p. 167, l.13-15. This assertion was neither incredible nor unrealistic considering that the petitioner was drunk and handling a loaded and cocked shotgun.

The state's evidence that the petitioner and his wife had been arguing on the morning of the shooting was derived from the testimony of Beth Wells. Ms. Wells, the decedent's sister, related the following conversation between herself and Mrs. Ross Brazell:[17]

> Q. What did y'all talk about?
>
> A. I asked her, I said, Mrs. Brazell, do you have any idea what happened while they were out here at your home? She said they were drinking and Tammie drank a little. She said Frankie

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[17] The March 8, 1981 family reunion was held at Mrs. Brazell's home. The shooting occurred later that day.

> was drinking quite heavily and Tammie got onto him about the drinking so heavily and Frankig (sic) told her just to go away and mind her own business. There was another time, she said, that Frankie and John were arguing and Tammie told Frankie that a family reunion type thing wasn't the place to have an argument, that they could take it elsewhere. Frankie told her again to go away and mind her own business and to leave him alone.[18]

Transcript, p. 204, l.4-13.

However, Mrs. Brazell denied making the above statements to Ms. Wells[19] and stated that the petitioner and his wife "got along wonderful over there at my house" and that she had not heard any argument. Transcript, p. 206, l.5-8.

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[18] This conversation allegedly took place on March 9, 1981.

[19] Ms. Wells was also impeached when she admitted that she hated the petitioner. Transcript, p. 204, l.21.

Finally, Mr. Haskell Jeffords, the petitioner's father, testified that, "She [the petitioner's wife] mentioned one time that he [the petitioner] had too many and he said, well, you're drinking, too. Wasn't an argument." Transcript, p. 208, l.13-14. The petitioner denied that any argument had occurred that day. Transcript, p. 144, l.19-24. Obviously, the evidence was in conflict as to the characterization of any conversation which may have occurred at Mrs. Brazell's house between the petitioner and his wife. However, in light of human experience, it would be a strained conclusion to infer from the trial testimony that the petitioner shot his wife because she told him he was drinking too much.

The testimony of Dan De Freese, the firearms expert, was also capable of diverse inferences. Mr. De Freese's heretofore cited testimony was unfavorable to

the petitioner. However, despite a lengthy direct-examination by the solicitor, Mr. De Freese did not rule out the possibility that the gun discharged in the manner which the petitioner stated.[20]

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[20] The petitioner had stated that he was trying to unbreech the gun when it "slipped off and hit the bed and went off." Transcript, p. 149, l.4-5. Although the record is somewhat ambiguous, it appears defense counsel was addressing this theory at Transcript, p. 107, l.10-18, wherein the following exchange took place:

> Q. But if your finger comes off of that and hits the trigger, it'll go off.
>
> Q. If you cock this shotgun back like this and neglect to undo it before you try to breech it, it won't breech, will it?
>
> A. To the best of knowledge, it will not. When the weapon is fully cocked, it will not unbreech.
>
> Q. No matter how hard you pull, it's not go breech.

(Footnote Continued)

Finally, as regards the petitioner running from the Wells's home immediately after the shooting, the petitioner stated that he did so because of Mr. Wells's admonition to "get outa' there". Transcript, p. 149, l.24-25. The petitioner stated he then ran from the house to seek help for his wife. Transcript, p. 150,

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(Footnote Continued)

A. Evidently, the gun is designed so that it will not unbreech.

Q. But if your finger comes off of that and hits the trigger, it'll go off.

A. Given the circumstance that you have, obviously, that will happen.

While the above colloquy does not clearly substantiate the petitioner's theory, it does tend to show that it is not beyond belief or the realm of possibility.

1.1-3. As the Wells's home did not have a telephone, this action would not have been unreasonable under the circumstances. Transcript, p. 169, 1.12-14.

Notwithstanding the apparent equipoise of the inferences which can be drawn from these facts, the respondents contend that the evidence of the petitioner's guilt was overwhelming. However, the petitioner's actions immediately after the shooting tended to substantiate his accidental shooting theory. Immediately after the shooting, the petitioner stated that he did not mean to do it and that he should have a bullet put through his head. Transcript, p. 112, 1.18-19; p. 54, 1.16-21. See, also, Transcript, p. 30, 1.2-4, p. 31, 1.8-18. Additionally, the peti-tioner argued, as further evidence that the shooting was an accident, that he flagged down an ambulance and directed it to the

shooting scene, that he fought his father-in-law to get back into the Wells's home to aid his wife and that he fought policemen to see his wife at the Lexington County Hospital, where she was being treated for the shotgun wound. Transcript, p. 151, l.7-11, p. 170, l.6-25, p. 152, l.5-13.

In light of all of the above, it is obvious that this was a very close case for the jury to decide. Indeed, it is this very closeness which compels the court to conclude that the petitioner was prejudiced by trial counsel's ineffectiveness. The facts of the case were relatively undisputed and the case turned on the inferences to be drawn from these evidentiary facts. Regarding the charge of murder, the only issue before the jury was whether the petitioner acted with malice aforethought. As Strickland states, "a verdict or conclusion only

weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland at 696, 104 S.Ct. at 2069.

Additionally, the errors in this case went directly and pervasively to the inferences to be drawn from the trial evidence. Id. at 695-696, 104 S.Ct. at 2069. More importantly, they went directly to the sole issue in the case, the petitioner's intent at the time he shot his wife. Under these circumstances, the court concludes that there is a reasonable possibility that but for trial counsel's unprofessional errors the result of the proceeding would have been different. Id. at 694, 104 S.Ct. at 2068. Unquestionably, the court's confidence in the outcome of this verdict is undermined. For the foregoing reasons, the court cannot accept or adopt the

recommendation of the United States Magistrate in this instance.

Therefore, the court orders that the petitioner's writ of habeas corpus be granted and that the state discharge him within seventy-five (75) days of the filing of this order unless it decides to retry the petitioner within that period.

IT IS SO ORDERED at Columbia, South Carolina, this 31st day of March, 1987.

/s/_____
CLYDE H. HAMILTON
UNITED STATES
DISTRICT COURT

(2)

No. 87-1579

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

FRANK DURANT JEFFERS,

PETITIONER,

vs

WILLIAM D. LEEKE AND
T. TRAVIS MEDLOCK,
ATTORNEY GENERAL OF
SOUTH CAROLINA,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DONALD J. ZELENKA
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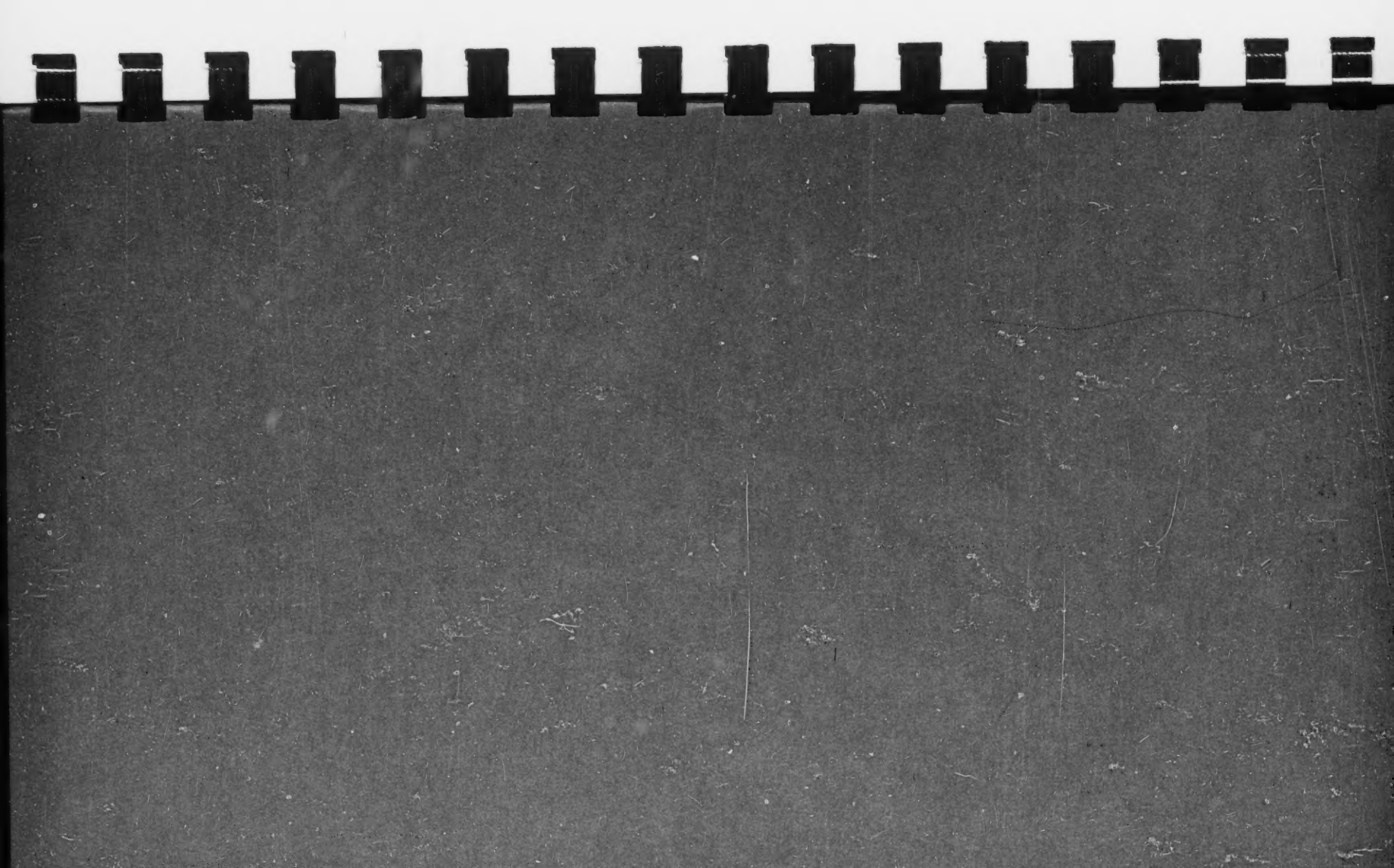
ATTORNEY FOR
RESPONDENTS

35 pp



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RESPONDENTS QUESTIONS PRESENTED

I.

Did the Court of Appeals have authority under Rule 52(a) of the Federal Rules of Civil Procedure to reject the District Court's conclusion of "prejudice" and determine there was no prejudice in an ineffective assistance of counsel claim in habeas corpus?

II.

Did the Court of Appeals properly find that a habeas corpus petitioner was not prejudiced by any alleged deficiency in counsel's performance?

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TABLE OF AUTHORITIES

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, above named, make a Brief in Opposition to the Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit.

ORDER BELOW

The opinion of the panel decided December 15, 1987, is reported at Jeffers v. Leeke, 835 F.2d 522 (4th Cir. 1987), and found in the Appendix pp. A1 - A17. A timely petition for rehearing with suggestion for rehearing in banc was denied on January 20, 1988, is unreported and found at pages A18 - A19. The order of March 31, 1987, of the Honorable Clyde H. Hamilton, Jr., United States District Judge, is unreported and set forth at pages A20 - A69.

JURISDICTION

The petition for rehearing was denied on January 20, 1988. Petitioner asserts the jurisdiction of this Court is made pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution which states, in its pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."

RESPONDENTS' STATEMENT OF THE CASE

The United States Court of Appeals reversed the judgment of the United States District Court and remanded with directions to dismiss the petition for a writ of habeas corpus on the ground of ineffective assistance of counsel. This petition for certiorari follows.

The habeas Petitioner, Frank Durant Jeffers, was indicted at the

April, 1981 term of the Court of General Sessions for Lexington County for murder. He was represented at that time by H. Patterson McWhirter, Public Defender for Lexington County. After a trial by jury on October 30, 1981, he was found guilty of murder and sentenced by the Honorable George Bell Timmerman, Jr., to life imprisonment.

Thereafter, Petitioner filed a notice of intention to appeal and the appeal from his conviction and sentence was perfected by the Office of Appellate Defense. The South Carolina Supreme Court dismissed the appeal under Rule 23 of the Rules of Practice of that court. State v. Jeffers, Mem. Op. No.83-MO-111 (filed May 20, 1983). (A. p. 310).

Thereafter, by way of an Application for Post Conviction Relief dated August 4, 1983, Petitioner instituted collateral proceedings in the Lexington County Court of Common Pleas. In the Application, Petitioner alleged, inter alia, that his attorney did not object or move for a mistrial when reference was made during the trial to his post-arrest silence. After an evidentiary hearing was held on the allegations on July 25, 1984, the Honorable Larry R. Patterson, Presiding Judge, issued his order dated November 21, 1984, denying and dismissing the state Application for Post-Conviction Relief. (A. pp. 347-356).

Petitioner thereafter filed a Petition for Writ of Certiorari to

the South Carolina Supreme Court appealing the denial of post conviction relief. Petitioner raised the issues whether he received ineffective assistance of counsel when his attorney did not object to evidence that Petitioner had requested an attorney and exercised his right to remain silent and whether counsel's error in failing to object was harmless beyond a reasonable doubt. (A. pp. 357-372). After return was made by the state, (A. pp. 373-380), the South Carolina Supreme Court issued its order dated August 28, 1985, stating that "after careful consideration of this Petition, we are of the opinion it should be denied." (A. p. 381).

Thereafter, Petitioner filed his Petition for Writ of Habeas Corpus in the federal court. (A. pp. 382-387). The state moved for summary judgment. (A. pp. 388 - 400). The matter was referred to the federal magistrate who issued his report and recommendation to the District Court recommending that Respondent's Motion for Summary Judgment be granted. (A. pp. 401-411). The Magistrate found that "this Court is bound by the state court's finding of historical fact that trial counsel's failure to object to comments concerning the Petitioner's request for counsel was tactical decision." (A. p. 408). The Magistrate also found that Petitioner was not denied effective assistance of

counsel since, based on a review of all of the evidence, Petitioner did not prove that, but for counsel's alleged errors, the result of the proceeding would have been different under the prejudice prong of the test enunciated in Strickland v. Washington, 466 U.S. 668 (1984). (A. pp. 409-411).

The Petitioner made written objections to various factual findings of the report. (A. pp. 413-415).

On March 31, 1987, the Honorable Clyde H. Hamilton, United States District Judge, issued his order that the writ of habeas corpus be issued directing that the state discharge Petitioner within seventy-five days of the filing of this order unless the state decided

to retry the Petitioner within that period. (A. pp. 416-443). The District Court concluded that the Petitioner received ineffective assistance of counsel in the state criminal trial.

The Respondents appealed to the United States Court of Appeals for the Fourth Circuit. The Court reversed the lower court and concluded the Petitioner was not prejudiced by defense counsel's failure to object to comments on his postarrest silence and request for counsel where no special attention was directed to the comments and there was no reasonable probability that, absent the errors, the jury would have had a reasonable doubt respecting guilt. The Court also held that

although the prosecution improperly elicited and made comments on his postarrest silence to counter his claim of accident, the references were harmless beyond a reasonable doubt in view of extensive testimony that from the time of the shooting continuing through the trial the Petitioner consistently asserted the defense of accident and also in view of the quantum of other evidence indicative of his intent.

Statement of the Facts

On March 8, 1981, the Petitioner shot and killed his wife, Tammie Wells Jeffers. On October 30, 1981, Petitioner proceeded to be tried by a jury and was found guilty of murder and sentenced by the Honorable George

Bell Timmerman, Jr., to life imprisonment. At trial, Petitioner admitted shooting his wife with his shotgun but argued that the shooting was an accident. Petitioner testified that, on the day of the incident, he, his wife and infant daughter visited various relatives and friends. Petitioner also admitted that he smoked some marijuana and drank some alcoholic beverages. Following their visits, Petitioner and his family returned home. At that time, they were living in the home of the deceased's father and mother. Petitioner went into his bedroom to listen to music. Over a period of time, Petitioner raised the volume of his stereo and his father-in-law told Petitioner's wife, the

deceased, to cut the stereo down. Petitioner further testified that he went to his closet and took out a single-shot shotgun. He stated that he loaded the shotgun with a shell and placed the gun on the bed. Petitioner further testified that his wife soon thereafter entered the room, holding their baby, at which time the Petitioner picked up the gun and cocked it. Petitioner stated that his wife asked him what he was going to do with the gun and Petitioner replied he wanted his father-in-law to come into the room and try to tear his stereo up as he had threatened to do. He testified that he wanted to scare his father-in-law. Petitioner further stated that he made a sudden movement trying to

unbreech the shotgun at which time his wife screamed, "no, Frankie, no, don't." He stated then that the gun slipped out of his hands, fell on the bed, went off and struck his wife. Petitioner then ran out of the house but after a few minutes, tried to return. At that time, his father-in-law would not let him back inside and Petitioner pulled a knife on him and attempted to hit him with a coke bottle. The victim was taken to the hospital where she died shortly thereafter. (See A. pp. 164-176).

The critical issue in this case concerns whether trial counsel rendered ineffective assistance of counsel under Strickland, supra, by failing to object to or make

motions to strike testimony or move for a mistrial on three occasions when reference was made to Petitioner's silence or request for counsel after he had been read his rights under Miranda v. Arizona, 384 U.S. 436 (1966). The first occasion involved the Solicitor's direct examination of the investigating officer, Detective Dalton White. The testimony was as follows:

> Q: Did you have occasion to see him after he got back to the jail?
>
> A: Yes, sir. It's normal procedure after a person has been booked in, if it's a case I've been assigned to, I get the person and bring 'em back down to my office and talk to 'em. I talked to him; I advised him of his rights; and he refused to talk to me and requested an attorney be present.
>
> Q: Did you interrogate him any further?

> A: No, sir. I turned him back to the jail sergeant.

(A. pp. 70-71). On cross - examination of Detective White, the following exchange took place between trial counsel and the witness:

> Q: Did you ask him where he was going when he was wandering four blocks away?
>
> A: When I talked to Frankie he indicated that he wanted an attorney.
>
> Q: That was after a while, but at first when you talked to him, he was just upset.
>
> A: Yes, sir.

(A. p. 88). Finally, during a portion of the Solicitor's argument to the jury, the Solicitor stated:

> Then they took him back to the Sheriff's Department, booked 'im and when they tried to talk to'im, what did Frank say? I want a lawyer. This is a man who was so distraught

> over his wife, who was incoherent with grief, out of his mind with misery, and he wants a lawyer right away. Was he so out of his mind that he doesn't know to ask for an attorney. He knows he's in trouble. Big trouble. He's sharp enough to ask for an attorney.

(A. p. 228). After hearing the testimony of the state's witnesses and the witnesses for the defense, as well as the closing arguments of counsel and the trial judge's instructions, the jury returned a verdict of guilty and Petitioner was sentenced to life imprisonment.

ARGUMENT

I.

> The "clearly erroneous" standard of Rule 52(a) is inapplicable to the mixed question of law and fact of ineffective assistance of counsel.

The Petitioner contends that the Court of Appeals had no

authority under Rule 52(a) of Federal Rules of Civil Procedure to reverse a conclusion of the District Court of prejudice unless it determined the finding was "clearly erroneous." The Court below did not state whether it was applying the "clearly erroneous" standard to the conclusion of the Court. Assuming arguendo that it did, Rule 52 has no applicability to a mixed question of law and fact.

Whether the representation a criminal defendant received at trial was "constitutionally inadequate" is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the Court stated:

> Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

466 U.S. at 698. Respondents submit that the "clearly erroneous" standard applies to the "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators ...." Townsend v. Sain, 372 U.S. 293, 309 n. 6 (1963). Respondents further submit that the standard does not apply to the legal effect to be accorded the district court's findings of basic, historical fact, where the court of

appeals is free to substitute its own judgment for that of the district court.

In Strickland, this Court clearly stated both the performance and prejudice components of the ineffectiveness that were mixed questions of law and fact rather than historical facts. In his Petition, the Petitioner maintains that "prejudice" is a finding of fact. His position is clearly wrong and not in accord with the Strickland decision upon which he relies. The appellate court has the authority to determine under its own judgment whether the conduct determined by the historical facts constitutes ineffective assistance of counsel. See Wiley v. Wainwright, 793 F.2d 1190 (11th Cir. 1986).

In summary, this Court's precedent makes clear that whether a defendant has enjoyed effective assistance of counsel is a mixed question of law and fact. While subsidiary findings of basic, historical fact that a district court made after it conducted an evidentiary hearing are subject to review under the clearly erroneous standard of Rule 52(a), the district court's ultimate conclusions as to whether he enjoyed the effective assistance of counsel is not subject to review under that standard, and the court of appeals must make an independent evaluation based upon those historical findings in determining whether counsel's representation satisfied the qualitative,

normative standards dictated by the Sixth Amendment. Accord Government of Virgin Islands v. Zepp, 748 F.2d 125, 134 (3rd Cir. 1984); Washington v. Watkins, 655 F.2d 1346, 1354 (5th Cir. 1981); Wiley v. Wainwright, supra. The Court of Appeals complied with this Court's precedent and the petition for certiorari is without merit.

II.

The Court of Appeals properly concluded that the Petitioner was not prejudiced by defense counsel's failure to object to comments of his postarrest silence and request for counsel.

The Court of Appeals determined that there was no reasonable probability that, absent the failure to object, the jury would have had a reasonable

probability respecting guilt. Respondents submit that the Court properly applied this Court's precedent and that certiorari should be denied.

In its opinion, the Fourth Circuit did not address whether the performance was deficient because it concluded that the Petitioner had not established prejudice. To establish prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Considering the

totality of the evidence, the Court found that there was no a reasonable probability that, absent the errors, the factfinder would have a reasonable doubt respecting guilt. Id. at 695.

Here, the Court found that no special attention was directed at the two comments on postarrest silence. Further, the comment on recross-examination of the investigating officer was clarified by testimony that the Petitioner only requested counsel "after awhile, but at first when [the officer] talked to him, he was just upset." (A. p. 88). During the argument, the prosecutor argued that his silence and request for counsel were inconsistent with his assertion of being distraught and

incoherent with grief. The Court found, however, that any negative impact from these comments was diminished by the extensive evidence that from the moment the shooting occurred, the Petitioner did appear to be upset and was persistent in his claim that the shooting was an accident. He made numerous statements to law enforcement and others immediately after the shooting that were wholly consistent with his trial testimony.

Here, the comments as to postarrest silence could not have planted in the mind of the jury that the defendant had something to hide or that his defense of accident which was proffered was recent fabrication. These were the

concerns of Doyle v. Ohio, 426 U.S. 610, 616-617 (1976). The impact of the comments here was harmless beyond a reasonable doubt in view of the entire record that included his consistent and continuous assertions of an accident defense. The Court of Appeals decision properly applied the precedent of this Court and certiorari is not warranted.

CONCLUSION

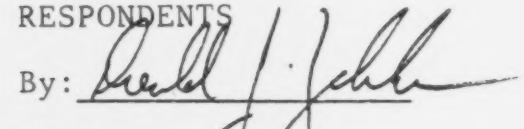
For all the foregoing reasons, we submit that certiorari must be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney
General

ATTORNEYS FOR
RESPONDENTS

By: 

April 21, 1988
Columbia, South Carolina

No. 87-1579

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of Brief in Opposition to Petition for Writ of Certiorari in the above captioned case by depositing same in the U. S. Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 21st day of April, 1988.

Donald J. Zelenka

SWORN to before me this
21st day of April, 1988.

(LS)
Notary Public for South Carolina
My Commission Expires: 4-21-99.

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief in Opposition to Petition for Writ of Certiorari on the Petitioner by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to James B. Richardson, Jr., Richardson and Smith, 1338 Main Street, Suite 808, Columbia, South Carolina 29201. He further

certifies that all parties required to be served have been served.

This 21st day of April, 1988.

Donald J. Zelenka

SWORN to before me this
21st day of April, 1988.

Frances R. Cowan (LS)
Notary Public for South Carolina
My Commission Expires: 4-14-97.